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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 322.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 323.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

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(26,268)
(26,269)

Citations.

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Since the filing of original brief of defendants in error, the plaintiff in error has filed a reply brief and has notified the clerk of this court and counsel for defendants in error that

plaintiff in error desires to submit its case on briefs without oral argument. At the time defendants in error prepared their brief it was expected that the case would be argued orally before the court. In view of this, defendants in error also submit their case without oral argument, but in so doing ask leave to have this supplemental brief filed and considered.

The opinion of the Supreme Court of Colorado was a decision *en banc*, all members of the court concurring, and is to be found on pages 105 to 109 of the Transcript of Record. See City and County of Denver *et al.*, plaintiffs in error, *vs.* Denver & Rio Grande Railroad Company, defendant in error, 167 Pac., 969; L. R. A., 1918-D, page 659. A reference to the map found at page 74 of the record will facilitate an understanding of the case. The green lines represent the track of the D. & R. G. Railroad Company, and the red lines those of the Union Pacific Railroad Company; and while the map indicates that there are two tracks of the D. & R. G. Railroad Company at the intersection of 17th Street and Wynkoop Street, it is stipulated in the record (page 53 of Record) that there is but one track of the D. & R. G. Railroad at this intersection, and plaintiff in error so states in its brief (See p. 5 orig. brief); the other track crossing the intersection being that of the Union Pacific Railroad Company. While the map does not show the location of the present Union Depot, where all trains receive and discharge passengers in Denver, Wynkoop bounds it on the southerly side; said depot is just northerly from said intersection, and as is shown by the testimony the point where the intersection involved is, is directly in front of the entrance to said Union Depot and is the main thoroughfare in going to and from said Union Depot (Record, p. 107). The location of the intersection involved and the large number of persons crossing said intersection daily is one which makes the case of surpassing importance to Denver and her people considering it from a standpoint of public safety, convenience and general welfare, and while it

is of great importance to Denver and her people that the right of the city in the exercise of its police power to remove said track should be upheld, the importance of this right will grow from year to year as the city continues to increase in population. It was apparent to the Supreme Court of Colorado and we think it will likewise be obvious to this court that it is neither safe nor desirable that a railroad track should be operated directly in front of the Union Depot and over the main thoroughfare going to and from the same for the purpose of moving freight cars either in the day or night time. It is to be borne in mind that when this track was located it was located for a main line and for the purpose of reaching the then depot at 19th and Wynkoop Streets. But for the benefit of all concerned, the depot was moved to its present location; another street provided for the main line, and certain streets and alleys vacated for the purpose of accommodating the new Union Depot, and the tracks entering the same. Whitsett *vs.* Union D. & R. Co., 10 Colo., 243, 247, 248. So it clearly appears from the record that the city has granted and afforded another location for the track which plaintiff in error says was constructed by virtue of Ordinance 9 of 1871. But plaintiff in error asserts that it now has a right to maintain an industry track or spur track because originally it was granted the right to build this main line track which has now been removed, notwithstanding said ordinance of 1871 required that the railway company should own the land on both sides of the street before such spur tracks should be maintained, and because of the ratification acts and ordinances which plaintiff in error asserts have been passed. The ordinances of 1875 and 1878, if effective at all, grant no greater rights than the original ordinance granted because they do not purport to go further than to ratify the provisions of the ordinance of 1871, which the trial court, although granting the injunction, held to be void (see page 95 of Record). We think this case is very similar to and is ruled by the case of Seaboard Air Line Rail-

way *vs.* City of Raleigh, 242 U. S., page 15. The following quotation from that case, beginning at page 19, is pertinent:

> "The contention that even though this be the case, inasmuch as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractural and permanent right must be inferred, is manifestly without merit. Indeed it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractural and permanent."

And in the Bristol case, 151 U. S., 556, this court held a railway crossing could be abated in the exercise of the police power.

We think the most that can be said as a result of the various acts and circumstances relied upon by plaintiff in error, is that the railroad has been operating this industry track as a mere licensee, and that requiring it to remove the track at the intersection only, is no impairment of any right under the Constitution of the United States, but is a legitimate, reasonable and proper exercise of the police power by the city. It is conceded that all of the tracks on Wynkoop Street west of the intersection are still connected with the other tracks of the D. & R. G. Railroad, and as will appear from the evidence and the map already referred to, the tracks of the D. & R. G. R. R. Co. east of the intersection involved, are connected up with those of the Union Pacific Railroad Co. and it does not seem to be disputed that the industry track east of the intersection may be used to accommodate the industries located thereon in connection with the track of the Union Pacific Co. now connected therewith. But plaintiff in error says that there is some expense involved in connection therewith and some loss of revenue on account of being obliged to operate in this way. This is not a sufficient reason to prevent the city from exercising its police

power for the protection of persons passing over this thoroughfare and for the benefit of the public safety.

Importance is attached to the paving ordinance. It was a general ordinance of 1912 applying to all railroads alike in that district and simply required them to pave between the rails and two feet outside thereof. This amounts to no recognition and creates no estoppel under the circumstances.

Plaintiff in error says at page 16 of its reply brief in discussing the ordinance of 1871: "Even if such conditions were attached to the building of the track in question and even though that condition had not been complied with, acquiescence by the city for forty years would amount to a waiver of that condition." This in substance, as we understand, was the argument used in Seaboard Air Line *vs.* City of Raleigh, *supra*, and was the doctrine renounced by this court. And as we understand the reply brief of plaintiff in error, it is contended that if no one of the several acts relied on are sufficient, taken collectively, they are sufficient to grant a right to occupy this street, and that the city is now estopped to deny such right. This thought is to be found at page 3 of the reply brief, where it is said: "A proper consideration of this condition requires that the entire group of laws, acts, ordinances and facts be taken into the reckoning if equitable results are to be reached." We do not think that this court can seize upon any such uncertainties for the purpose of denying to a municipality the right to exercise its police power for the benefit of the public safety and general welfare.

It is stated on page 19 of the reply brief that the D. & R. G. R. R. "does not reach the Denver Union Terminal Depot" and that "it has no track through the depot grounds." We cannot think that counsel intend by this statement to mean that the Denver Union Terminal Co., which is simply a holding company for the benefit of all the railroads entering Denver, does not operate the Union Depot for the benefit of the D. & R. G. Co. as much as for the benefit of the other railroads

using it for terminal facilities. Neither can we think that it is seriously contended that if the city would ordinarily have the right in the exercise of the police power to prevent the use of this intersection for the operation of freight trains to serve a few industries located on a spur track, the fact that some of the commodities in the freight cars passing over the track may go into interstate commerce will prevent the exercise of the police power for the benefit of the public safety. The only limitation upon the exercise of the police power is that it must not be unreasonable and what might be considered unreasonable at comparatively unimportant intersections might be very reasonable and proper on a main thoroughfare directly in front of a union depot where thousands of people pass and repass every day in the year. We think that plaintiff in error has been unable to point to any definite or specific authority giving it a right to operate freight cars over this spur or industry track at the intersection involved, and that if it could point to such authority that the Supreme Court of Colorado is right in saying that, under the circumstances, considering the nature of the thoroughfare, it is a reasonable and proper exercise of the police power for the city to require the removal. It would be an exceedingly unfortunate thing for the welfare of Denver if it does not have such a right.

Respectfully submitted,

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Attorneys for Defendants in Error.

Counsel for Plaintiff in Error.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

DENVER & RIO GRANDE RAILROAD COMPANY *v.* CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO.

Nos. 322, 323. Submitted April 23, 1919.—Decided June 2, 1919.

Contract and property rights of a railroad company in respect of the operation of a track in a public street are held subject to the fair exercise by a State, or by a municipality as its agent, of the power to make and enforce regulations reasonably necessary to secure public safety. P. 244.

A track constructed under ordinance grant by a railroad as part of its main line but later used only to serve abutting private industries, traversed a city side street and crossed a thoroughfare used daily by thousands of people in approaching and leaving the Union Depot, which was very near the intersection. *Held*, that an ordinance of the city requiring removal of the track where it crossed the thoroughfare, for the safety of the public, did not violate the rights of the railroad under the contract and due process clauses, it appearing that use of the track could still be maintained through connections with the yards of its owner and of another company, and that resulting expense and loss of revenue would be relatively small. P. 245.

An ordinance which makes no discrimination against interstate commerce, and affects it only incidentally and indirectly, is not objectionable under the commerce clause. P. 246.

167 Pac. Rep. 969, affirmed.

THE case is stated in the opinion.

Mr. E. N. Clark for plaintiff in error. *Mr. J. G. McMurry* was on the briefs.

Mr. James A. Marsh and *Mr. Norton Montgomery* for defendants in error. *Mr. J. J. Lieberman* was on the briefs.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the enforcement of an ordinance directing the removal of a railroad track from the intersection of two streets in Denver. On the hearing the plaintiff prevailed, but this was reversed by the Supreme Court of the State with a direction to dismiss the complaint, 167 Pac. Rep. 969, and the direction was followed. The case is here on two writs of error when one would suffice.

The ordinance is assailed as contravening the contract and commerce clauses of the Constitution and the due process clause of the Fourteenth Amendment.

In 1881 a union depot with appurtenant tracks was established in Denver, the streets and alleys within the grounds thus occupied being vacated by the city; and since then all railroads entering the city have used this depot and its tracks. Wynkoop Street is outside the depot grounds and extends east and west along their south line. The depot faces that street and is but a short distance from it. On the other side of the depot are the depot tracks. These connect on the west with several railroad yards including that of the Rio Grande Company, and on the east with other railroad yards, including that of the Union Pacific Company. Wynkoop Street is intersected just opposite the entrance to the depot by Seventeenth Street, which extends northward through the city and is one of its main thoroughfares. Persons and vehicles approaching or leaving the depot pass over this intersection, the number doing so each day being approximately two thousand.

The plaintiff, the Rio Grande Company, has a track in Wynkoop Street from Nineteenth Street to Fourteenth Street. At its eastern terminus—near Nineteenth Street—this track meets a track of the Union Pacific Company which is connected with the yard of that company, and at Fourteenth Street it curves and leads to the Rio Grande Company's yard. Originally it was part of the Rio Grande Company's main line, but since 1881, when the union depot was established, it has been used only as a side track in serving industries on the south side of Wynkoop Street.

The ordinance assailed directs the removal of so much of this track as lies within the intersection of Wynkoop and Seventeeth Streets, that is to say, the portion over which persons and vehicles pass in moving to and from the union depot; and a preamble recites that the use of that portion of the track impedes public travel, affects the safety of persons approaching or leaving the union depot and is no longer essential to the Rio Grande Company.

The Union Pacific Company has a track in the same intersection which the ordinance deals with in the same way, but that company apparently is not complaining.

If the ordinance is enforced the Rio Grande Company can reach the industries on its track in Wynkoop Street between Seventeenth and Nineteenth Streets only through the tracks of the union depot and the Union Pacific. Because of this it will be subjected to some expense and delay not heretofore attending that service, and it also will be prevented from switching cars to and from those industries for other railroads and thereby will lose some revenue. But, according to the record, the loss in expense and otherwise incident to these disadvantages will be relatively small.

The track in Wynkoop Street has been there since 1871, and we shall assume, as did the Supreme Court of the State, that it was put there in virtue of some ordinance of

that period, and that the ordinance became a contract and the right granted became a vested property right. But, as this court often has held, such contracts and rights are held subject to the fair exercise by the State, or the municipality as its agent, of the power to adopt and enforce such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant" and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76. Of course, all regulations of this class are subject to judicial scrutiny and where they are found to be plainly unreasonable and arbitrary must be pronounced invalid as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions.

The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis*, 232 U. S. 430; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe, *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there, *Baltimore* v. *Baltimore Trust Co.*, 166 U. S. 673; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another

location at its own cost to make room for a public drainage system, *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453.

Is the ordinance here in question plainly unreasonable and arbitrary? That there is occasion for some real regulation is clear. The crossing is practically in the gateway to the city. Persons in large numbers pass over it every day—many of them unacquainted with the surroundings. Moving engines and cars to and fro over such a place makes it one of danger. Any one of several forms of corrective regulation might be applied. To illustrate: The city might call on the railroad company to construct and maintain a viaduct over the crossing or a tunnel under it; or might lay on the company the duty of maintaining watchmen or flagmen at the crossing. What it actually does by the ordinance is to call on the company to remove the track from the crossing and avail itself of other accessible and fairly convenient means of getting cars to and from its track east of the crossing. No doubt in this the company will experience some disadvantages, but they will be far less burdensome than would be the construction and maintenance of a viaduct or tunnel, and not much more so than would be the keeping of watchmen or flagmen at the crossing.

The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary.

Counsel for the company manifest some concern lest the rates for switching cars to and from its track east of the crossing may not be satisfactory, but there hardly can be any real trouble along that line. The rates will be subject to investigation and supervision by public commissions just as are other railroad rates, and possible differences over them will be susceptible of ready adjustment.